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Negligence—Complaint Alleging Mother's Mental Distress With Physical Manifestations Caused by Witnessing Death of Her Son by Alleged Negligence of Defendant Held to State a Cause of Action.

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nate it.[20] Finally, and more narrowly, it could have pointed to the novel scheme adopted by the legislation involved. It goes beyond the common law doctrine of *respondeat superior* by freeing the tort-feasor altogether while shifting liability solely to the employer. It is hard to conceive that a legislature, in enacting legislation designed to free policemen from tort liability, also intended that the fellow servant rule would be available as a defense against a member of the very group whose financial welfare was to be advanced. These two grounds would have provided the court with the opportunity to abolish this rule which both majority and dissent decry as being antiquated, wicked, callous to human rights and inherently and grossly unjust.

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NEGLIGENCE

COMPLAINT ALLEGING MOTHER'S MENTAL DISTRESS WITH PHYSICAL MANIFESTATIONS CAUSED BY WITNESSING DEATH OF HER SON BY ALLEGED NEGLIGENCE OF DEFENDANT HELD TO STATE A CAUSE OF ACTION.

While crossing a highway, plaintiff's son was struck and instantly killed by defendant, who was negligently driving her husband's automobile. Plaintiff, who had been standing by the side of the road watching her son cross, sued for personal injuries, alleging severe mental distress with physical manifestations, occasioned by witnessing his death. Defendant moved to dismiss the complaint for failure to state a cause of action. *Held*, motion denied. A pleading of negligent infliction of severe mental distress with physical manifestations, by a mother who was present and saw her son killed by defendant's negligence, states a cause of action, even though she herself was not placed in danger by defendant's act. *Haight v. McEwen*, 43 Misc. 2d 582, 251 N.Y.S.2d 839 (Sup. Ct. 1964).

Tort liability for the infliction of mental distress has passed through relatively well-defined stages of development.[1] It was first treated as an element of "parasitic" damages—that is, invasion of the plaintiff's "interest in mental tranquillity"[2] could be considered in the determination of damages, but not in the determination of liability.[3] Subsequently a duty was imposed on those engaged in a "common calling" to refrain from unreasonably invading the right. Thus liability for the infliction of mental distress was ex-

20 See Keeton, *Creative Continuity in the Law of Torts*, 75 Harv. L. Rev. 463 (1961).

1. For an extensive treatment of this development see Amdursky, *The Interest in Mental Tranquility*, 13 Buffalo L. Rev. 339 (1964), in which the intentional invasion of this interest is treated as antedating the imposition of liability to those engaged in a common calling.
2. *Ibid.*
3. 1 Street, Foundations of Legal Liability 461 (1906).

tended to such classes as innkeepers[4] and common carriers.[5] More recently, the intentional invasion of this "interest" has been treated as a separate tort.[6] At present liability is in some cases extended to members of the general public.[7] This development tends toward imposing liability where a plaintiff witnesses a negligent act toward another—a third person.[8] Plaintiff in such a case becomes an onlooker. Because the gap between liability on the part of a member of the general public to a plaintiff directly involved, and the imposition of liability toward a plaintiff who is an onlooker is large, the courts have held the defendant, even in cases of intentional torts, only where there is extremely violent attack.[9]

The courts limit negligent onlooker claims primarily in terms of two concepts—the "impact"[10] test, in which recovery is denied absent contemporaneous physical contact with the person of the plaintiff, and the "zone of physical peril"[11] test, in which recovery is denied a plaintiff who is not himself placed in danger of immediate physical harm by the defendant's act.[12] To circumvent the overly mechanical impact rule, the courts have sometimes strained to find the necessary physical contact.[13] The decided weight of present authority denies recovery for the negligent infliction of mental distress, regardless of accompanying physical manifestations, by a plaintiff outside the zone of peril.[14]

4. See, *e.g.*, DeWolf v. Ford, 193 N.Y. 397, 86 N.E. 527 (1908); see generally 29 Am. Jur. *Innkeepers* §§ 56, 57 (1960).

5. See, *e.g.*, Gillespie v. Brooklyn Heights R.R. Co., 178 N.Y. 347, 70 N.E. 857 (1904).

6. Prosser, *Insult and Outrage*, 44 Calif. L. Rev. 40 (1956); Restatement (Second), Torts § 46(1) (Tent. Draft No. 1, 1957); State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal. 2d 330, 240 P.2d 282 (1952); Halio v. Lurie, 15 A.D.2d 62, 222 N.Y.S.2d 759 (2d Dep't 1961); Mitran v. Williamson, 21 Misc. 2d 106, 197 N.Y.S.2d 689 (Sup. Ct. 1960); see 52 Am. Jur. *Torts* § 49 (1944), and cases collected in Annot., 64 A.L.R.2d 100, 119 (1959).

7. Amdursky, *supra* note 1, at 341.

8. *Id.* at 347; see Prosser, Torts, § 37, at 182 (2d ed. 1955).

9. Prosser, *op. cit. supra* note 8, at 47.

10. *Id.* at 181.

11. Amdursky, *supra* note 1, at 347.

12. Regardless of the test used, the status of the bystander is all-important; those unrelated to the victim have always been denied recovery. Hay or Bourhill v. Young, [1943] A.C. 92; Van Hoy v. Oklahoma Coca-Cola Bottling Co., 205 Okla. 135, 235 P.2d 948 (1951); *cf.* Blanchard v. Reliable Transfer Co., 71 Ga. App. 843, 32 S.E.2d 420 (1944); Angst v. Great Northern R. Co., 131 F. Supp. 156 (D. Minn. 1955). These cases contain language which would seem to be broad enough to deny recovery even to a near relative.

13. Buckbee v. Third Ave. R.R., 64 App. Div. 360, 72 N.Y. Supp. 217 (2d Dep't 1901) (electric shock); Sawyer v. Dougherty, 286 App. Div. 1061, 144 N.Y.S.2d 746 (3d Dep't 1955) (splinters in a blast of air). *Cf.* Porter v. Delaware, Lackawanna & Western R.R. Co., 73 N.J.L. 405, 63 A. 860 (1906) (dust in the eye); Morton v. Stack, 122 Ohio St. 115, 170 N.E. 869 (1930) (inhalation of smoke); "A Georgia circus case has reduced the whole matter to a complete absurdity by finding 'impact' where defendant's horse 'evacuated his bowels' into plantiff's lap." Cristy Bros. Circus v. Turnage, 38 Ga. App. 581, 144 S.E. 680 (1928); Prosser, Torts 179 (2d ed. 1955).

14. Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935); Amaya v. Home Ice Fuel & Supply Co., 29 Cal. Rptr. 33, 379 P.2d 513 (1963), *reversing*, 23 Cal. Rptr. 131 (Dist. Ct. App. 1st Dist. 1962); Barber v. Pollock, 104 N.H. 379, 187 A.2d 788 (1963); Maury v. United States, 139 F. Supp. 532 (N.D. Cal. 1956); *cf.* Kelly v. Fretz, 19 Cal. App. 2d 356, 65 P.2d 914 (1937); Reed v. Moore, 156 Cal. App. 2d 43, 319 P.2d 80 (1957); Resavage v. Davies, 199 Md. 479, 86 A.2d 879 (1952); Robbins v. Castillani, 37 Misc. 2d 1046, 239 N.Y.S.2d 53 (Sup. Ct. 1962); Cote v. Litawa, 96 N.H. 174, 71

Thus, in *Berg v. Baum*[15] the complaint of a mother alleging severe mental distress on witnessing the injury of her son because of defendant's negligence, was dismissed, as she was outside the zone of peril. In denying recovery under the zone of peril test, the reason usually given is that the defendant has no duty toward the plaintiff, since no harm to him is foreseeable.[16] Tentative Draft No. 5 of the Restatement (Second) Torts (1960) has, in deference to the overwhelming weight of the case law,[17] dropped the Caveat appearing in section 313 of the Restatement, Torts (1934).[18]

Physical impact is no longer required in New York State to sustain a claim of mental distress. *Battalla v. State*[19] although overruling *Mitchell v. Rochester Ry.*,[20] did not deal with an onlooker claim, as plaintiff was within

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A.2d 792 (1950); All v. John Gerber Co., 36 Tenn. App. 134, 252 S.W.2d 138 (1952); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Lahann v. Cravotta, 228 N.Y.S.2d 371 (Sup. Ct. 1962); Cleveland, C. C. & St. L. Ry. v. Stewart, 24 Ind. App. 374, 56 N.E. 917 (1900); Nuckles v. Tenn. Electric Power Co., 155 Tenn. 611, 299 S.W. 775 (1927); *cf.* Sanderson v. Northern Pac. Ry., 88 Minn. 162, 92 N.W. 542 (1902).

Contra, Spearman v. McCrary, 4 Ala. App. 473, 58 So. 927 (1912); Cohn v. Ansonia Realty, 162 App. Div. 791, 148 N.Y. Supp. 39 (1st Dep't 1914), 162 App. Div. 794, 148 N.Y. Supp. 41 (1st Dep't 1914); Gulf, C. & S.F.R.R. v. Coopwood, 96 S.W. 102 (1906).

15. 224 N.Y.S.2d 974 (Sup. Ct. 1962).

16. Prosser, *op. cit. supra*, note 8, at 181.

17. Note 14, *supra*.

18. The Caveat read: "The Institute expresses no opinion as to whether an actor whose conduct is negligent as involving an unreasonable risk of causing bodily harm to a child or spouse is liable for an illness or other bodily harm caused to the parent or spouse who witnesses the peril or harm of the child or spouse and thereby suffers anxiety or shock which is the legal cause of the parent's or spouse's illness or other bodily harm." In the notes and comments appearing in the Tentative Draft, the Reporter, Dean Prosser, mentions that the Advisors are unanimous in wishing to retain the Caveat for its possible effect upon the courts, ". . . although it must be conceded that it has thus far had no effect. . . . The Council are agreed that the Caveat should go out, and the definite rule of non-liability should be stated." Restatement (Second), Torts, Note to Institute, § 313 (Tentative Draft No. 5, 1960). The Tentative Draft states the rule of § 313 as follows:

> (1) If the actor unintentionally causes emotional distress to another, he is subject to liability to the other for resulting illness or bodily harm if the actor
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> (a) should have realized that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and
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> (b) from facts known to him should have realized that the distress, if it were caused, might result in illness or bodily harm.

While this section is substantially unchanged, a second subsection has been added:

> (2) The rule stated in subsection (1) has no application to illness or bodily harm of another, caused by emotional distress arising solely from harm or peril to a third person, unless the negligence of the actor has otherwise created an unreasonable risk of bodily harm to the other.

The comment on subsection (2) states that subsection (1) applies only to emotional distress arising out of fear for plaintiff's own safety; it is not applicable where the emotional distress arises solely because of harm or peril to a third person, and plaintiff is not threatened with bodily harm in any way. The comment continues:

> Thus, where the actor negligently runs down and kills a child in the street, and its mother, in the immediate vicinity, witnesses the event and suffers severe emotional distress, resulting in a heart attack or other bodily harm to her, she cannot recover for such bodily harm unless she was herself in the path of the vehicle, or was in some other manner threatened with bodily harm, otherwise than through the emotional distress at the peril to her child.

19. 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961).

20. 151 N.Y. 107, 45 N.E. 354 (1896).

the zone of peril. Prior to *Battalla*, New York had denied recovery to parents for mental suffering caused by a child's illness or injury.[21] *Kalina v. General Hospital*[22] limits the application of *Battalla*; the court dismissed the parents' complaint, stating that they did not have a legally protected interest under the circumstances:

> The basic principle of these cited cases[23] is untouched by the recent reversal of the *Mitchell* doctrine. *Mitchell v. Rochester Ry. Co.* (151 N.Y. 107 [1896]) established the rule that there can be no recovery for injuries incurred by fright, negligently induced. *Battalla v. State of New York* (10 N.Y.2d 237 [1961]) expressly overruled it. We deem it the intention of the *Battalla* case to realistically enlarge the damage claim of one acted against. It did not intend to provide a cause of action for interested bystanders hitherto excluded.[24]

The latest New York case[25] involved a fact situation almost identical with the instant case; the complaint was dismissed. Other jurisdictions have reached the same conclusion.[26]

In the instant case the court based its opinion on a general trend rather than precedent, and was primarily concerned with plaintiff's right to bring an action, based on the fact that "Freedom from mental disturbance is now a protected interest in this State."[27] The *Battalla* decision is heavily relied upon. Defendant's argument that in that case, the plaintiff was the person placed in immediate danger, is treated as being inapplicable to the question of whether or not to dismiss the complaint. The court reasons that the only satisfactory method of answering this question is to analyze thoroughly the evidence adduced at trial. The above quoted passage from *Kalina* is dismissed as obiter dictum.

In support of its argument based on trend, the court relied on several cases which merit close examination. One had been reversed on appeal.[28] A

21. Roher v. New York, 279 App. Div. 1116, 112 N.Y.S.2d 603 (3d Dep't 1952); Blessington v. Autry, 105 N.Y.S.2d 953 (Sup. Ct. 1951); Balestrero v. Prudential Ins. Co. of America, 126 N.Y.S.2d 792 (Sup. Ct. 1953), *aff'd*, 283 App. Div. 794, 128 N.Y.S.2d 295 (2d Dep't 1954), *aff'd*, 307 N.Y. 709, 121 N.E.2d 537 (1954). In Fiorello v. New York Protestant Episcopal City Mission Society, 217 App. Div. 510, 514, 217 N.Y. Supp. 401, 406 (1st Dep't 1926) the court said:

> The parent's rights in an action for injuries to the child are restricted to an action for the loss of the child's services and for medical attendance and expenses. Mental suffering caused by the child's illness is not recoverable. §

22. 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963).

23. The court had previously cited, *inter alia*, the cases in note 21 *supra*, in support of its statement that damages are recoverable only by the person assaulted.

24. 31 Misc. 2d 18, 20, 220 N.Y.S.2d 733, 736 (Sup. Ct. 1961).

25. Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962).

26. See *supra* note 14.

27. Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958). In light of the *Berg* and *Kalina* cases, this statement is severely limited, and insofar as it represents the result in only a few cases, it is conclusory.

28. Amaya v. Home Ice, Fuel and Supply Co., 29 Cal. Rptr. 33, 379 P.2d 513 (1963), *reversing* 23 Cal. Rptr. 131 (Dist. Ct. App. 1st Dist. 1962).

second[29] seemingly allowed recovery only because the mother, although she felt no danger for herself and could easily have ducked into an alley, was nevertheless within the zone of risk. The case has been treated as allowing recovery on that ground.[30] A third[31] involved property damage and a statutory violation by a common carrier.

The instant case must be evaluated in the light of three important decisions.[32] It is distinguishable from *Battalla* where the plaintiff was within the zone of peril. It is distinguishable from *Kalina* in that plaintiff there alleged no physical manifestations; further, the tort relied on was assault and battery—an intentional wrong.[33] It is substantially the same as the *Berg* case.

It is in dealing with the *Kalina* case that the greatest barrier to the court's holding is encountered. In that case, the complaint was dismissed for lack of defendant's duty to plaintiff. This is conclusory;[34] the relevant question is: Why was there no duty? The *Kalina* court answered this question by saying the plaintiffs had no legally protected interest—because they were, in effect, onlookers. Thus, it would seem difficult to argue the quoted passage[35] is obiter dictum. This seems to be the reasoning in the *Berg* case, to which the court did not allude.

Although it is true that "Freedom from mental distress is now a protected interest in this State,"[36] and that every case must be decided according to the facts peculiar to it;[37] still, "[l]iability for damages caused by wrong ceases at a point dictated by public policy and common sense."[38] ". . . [o]nce

29. Hambrook v. Stokes Bros., [1925] 1 K.B. 141. Considerable doubt has been cast upon this case by King v. Phillips, [1953] 1 Q.B. 429.

30. Prosser, *op. cit. supra* note 8, at 181.

31. Gonsenhauser v. New York Cent. R.R., 8 A.D.2d 483, 188 N.Y.S.2d 901 (4th Dep't 1959).

32. Battalla v. State, 10 N.Y.2d 237, 176 N.E.2d 729, 219 N.Y.S.2d 34 (1961); Kalina v. General Hospital, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962).

33. Additionally, it is distinguishable from both *Kalina* and *Battalla* in that in those cases, defendant was engaged in a common calling, whereas in the instant case, defendant was a member of the general public. While this is generally of greater importance in questions of duty or standard of care, it is arguable that if recovery is not to be extended to a plaintiff where defendant, as in *Kalina*, is engaged in a common calling, *a fortiori* recovery should not be allowed where defendant is merely a member of the general public.

34. Prosser, *op. cit. supra* note 8, at 167; Klassa v. Milwaukee Gas Light Co., 273 Wisc. 176, 182, 77 N.W.2d 397, 401 (1956), quoting Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 14-15 (1953), reprinted in Prosser, *Selected Topics on the Law of Torts* 191 (1954); see generally Green, *The Duty Problem in Negligence Cases*, 28 Colum. L. Rev. 1014 (1928).

35. "We deem it the intention of the Battalla case to realistically enlarge the damage claim of one acted against. It did not intend to provide a cause of action for interested bystanders hitherto excluded." Kalina v. General Hospital, 31 Misc. 2d 18, 20, 220 N.Y.S.2d 733, 736 (Sup. Ct. 1961). It is because the parents have no legally protected interest as onlookers that Halpern, J., dissenting, argues that the parents are the parties *directly wronged*. He notes that "The impact of the *Battalla* decision upon that type of case is still to be determined." 18 A.D.2d 757, 760, 235 N.Y.S.2d 808, 814 (4th Dep't 1962).

36. Ferrara v. Galluchio, 5 N.Y.2d 16, 21, 152 N.E.2d 249, 252, 176 N.Y.S.2d 996, 999 (1958).

37. Bird v. St. Paul Fire & Marine Ins. Co., 224 N.Y. 47, 120 N.E. 86 (1918); Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 731, 219 N.Y.S.2d 34, 38 (1961).

38. Milks v. McIver, 264 N.Y. 267, 269, 190 N.E. 487, 488 (1934).

the door has been opened, the new and broader rule is in practice pressed to its extreme conclusion."[39] It is for this reason a Pennsylvania court recently refused to "open a Pandora's box."[40]

The idiosyncratic plaintiff poses special problems.[41] Ordinarily, a negligent defendant must take his victim as he finds him,[42] the usual argument being that as between an innocent victim and a negligent wrongdoer, the loss should fall on the latter. This reasoning is based on the foreseeability of damage, however, and is not readily extended to onlooker liability, where plaintiff's presence may not be foreseen at all. In such a situation, where the plaintiff is not directly wronged and defendant will be liable to the person injured, it would seem unjust to visit disproportionate double liability upon him. Although liability might be limited to parents or spouses, other situations immediately present themselves. If a child had been raised by an aunt, should she recover? Should recovery be allowed a sister, a mistress? Viewed in this context, Judge Van Voorhis' dissent in *Battalla*[43] becomes highly relevant.

For the present, the vast majority of jurisdictions[44] limits the expanding circle of recovery short of onlooker claims with respect to negligence situations. In New York, this has been accomplished by the *Kalina* case, with which the instant case is irreconcilable. The Court of Appeals deems it more just to limit defendant's liability to reasonably foreseeable consequences,[45] defined by the zone of peril, than to extend recovery to what would become, in time, an inevitable plaintiff; every child has *some* relative. It is submitted this is desirable social policy, and that the instant case should not be followed.[46]

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39. Van Voorhis, J., dissenting in Battalla v. State, 10 N.Y.2d 237, 244, 176 N.E.2d 729, 733, 219 N.Y.S.2d 34, 39 (1961).

40. Bosley v. Andrews, 393 Pa. 161, 168, 142 A.2d 263, 266 (1958). In retaining the impact rule, the court expressed fear of the possibility of fraudulent claims and the difficulty of proof.

41. Smith & Solomon, *Traumatic Neuroses in Court*, 30 Va. L. Rev. 87 (1943); McNiece, *Psychic Injury and Liability in New York*, 24 St. John's L. Rev. 1 (1949).

42. McCahill v. New York Transp. Co., 201 N.Y. 221, 94 N.E. 616 (1911); Owen v. Rochester-Penfield Bus Co., 304 N.Y. 457, 108 N.E.2d 606 (1952); 15 Am. Jur. *Damages* §§ 80, 81 (1938).

43. Battalla v. State, 10 N.Y.2d 237, 242, 176 N.E.2d 729, 732, 219 N.Y.S.2d 34, 38 (1961).

44. Cases cited note 14 *supra*.

45. "Mental pain or anxiety the law cannot value, and does not pretend to redress, when the unlawful act complained of causes that alone. Though where a *material* damage occurs, and is connected with it, it is impossible a jury, in estimating it, should altogether overlook the feelings of the party interested." Lynch v. Knight, 9 H.L.C. 577, 598; 11 Eng. Rep. 854, 863 (1861). (Emphasis added.)

46. In four cases in which *Battalla* was cited to the court, it was distinguished on the grounds that *Battalla* did not extend recovery to bystanders witnessing an accident. These were Lahann v. Cravotta, 228 N.Y.S.2d 371 (Sup. Ct. 1962); Berg v. Baum, 224 N.Y.S.2d 974 (Sup. Ct. 1962); Kalina v. General Hospital, 31 Misc. 2d 18, 220 N.Y.S.2d 733 (Sup. Ct. 1961), *aff'd*, 18 A.D.2d 757, 235 N.Y.S.2d 808 (4th Dep't 1962), *aff'd*, 13 N.Y.2d 1023, 195 N.E.2d 309, 245 N.Y.S.2d 599 (1963); Argyll v. International Security Bureau, 16 A.D.2d 921, 229 N.Y.S.2d 467 (1st Dep't 1962). The instant case was subsequently settled out of court.